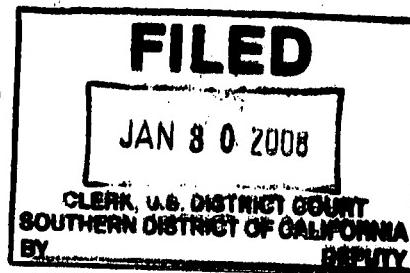


1 FRED M. PLEVIN (SBN 126185)
2 SANDRA L. McDONOUGH (SBN 193308)
3 ALBERT R. LIMBERG (SBN 211110)
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9 Facsimile: 619-615-0700

'08 CV 0184 L CAB

6 AMY S. GONZALEZ (SBN 181745)
7 SAN DIEGO COUNTY REGIONAL AIRPORT
8 AUTHORITY
9 3225 N. Harbor Drive
10 San Diego, CA 92138
11 Telephone: (619) 400-2425
12 Facsimile: (619) 400-2428



10 Attorneys for Defendant
11 SAN DIEGO COUNTY REGIONAL AIRPORT
12 AUTHORITY

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

15 JOSE HERNANDEZ,

16 Plaintiff,

17 v.

18 SAN DIEGO COUNTY
19 REGIONAL AIRPORT
20 AUTHORITY, a public entity; and
21 DOES 1 through 12, inclusive,

22 Defendants.

CASE NO.

NOTICE OF REMOVAL OF ACTION:
UNDER 28 U.S.C. § 1442(B)
(FEDERAL QUESTION)

EXHIBITS 76-96

22 ///

23 ///

24 ///

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1 Lawrence J. Kouns, State Bar No. 095417
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5 Telephone No.: 619.236.1414
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Attorneys for Edward P. Swan, Jr.

6

7

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT**

11 JOSE HERNANDEZ,

12 Plaintiff,

13 | v.

14 SAN DIEGO COUNTY REGIONAL
15 AIRPORT AUTHORITY, a public entity and
DOES 1 through 12, inclusive.

16 | Defendants.

Case No. GIC 871979

**NOTICE OF MOTION AND MOTION
FOR PROTECTIVE ORDER [CCP
§ 2025.420]**

Date: December 19, 2007

Time: 9:00 a.m.

Dept: 75

Judge: Hon. Richard E. L. Strauss

Trial Date: January 4, 2008

18 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

19 PLEASE TAKE NOTICE that on December 19, 2007 at 9:00 a.m. in Department 75 of the
20 above-entitled Court, located at 303 West Broadway, San Diego, California 92101, third party
21 Edward P. Swan, Jr. will and hereby does move for a protective order with regard to the Deposition
22 Subpoena For Personal Appearance and Production of Documents And Things.

23 | //

24 | //

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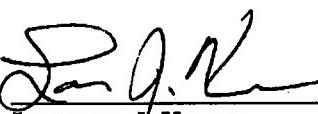
1 This motion is made pursuant to California Code of Civil Procedure Section 2025.420 on the
2 grounds set forth in the accompanying memorandum of points and authorities in support of this
3 motion, the declarations of Lawrence J. Kouns and Edward P. Swan, Jr., the Notice of Lodgment of
4 Exhibits, and whatever additional evidence and argument may be submitted before or during the
5 hearing.

6

7 DATED: November 26, 2007 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

8

9 By:



10 Lawrence J. Kouns
11 Attorneys for Edward P. Swan, Jr.

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8 Attorneys for Edward P. Swan, Jr.

9

10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 FOR THE COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT

13

14 JOSE HERNANDEZ,,

Case No. GIC 871979

15 Plaintiff,

PROOF OF SERVICE

16 v.

17 SAN DIEGO COUNTY REGIONAL
18 AIRPORT AUTHORITY, a public entity and
19 DOES 1 through 12, inclusive.,

20 Defendants.

21

I, Renee' M. Evans, declare as follows:

22 I am employed with the law firm of Luce, Forward, Hamilton & Scripps LLP, whose address is
23 600 West Broadway, Suite 2600, San Diego, California 92101-3372. I am over the age of eighteen
24 years, and am not a party to this action.

25

On November 26, 2007, I served the following:

26

(1) NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER [CCP
27 § 2025.420]; (2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
28 MOTION FOR PROTECTIVE ORDER [CCP § 2025.420]; (3) DECLARATION OF
LAWRENCE J. KOUNS IN SUPPORT OF MOTION FOR PROTECTIVE ORDER [CCP
§ 2025.420]; (4) DECLARATION OF EDWARD PATRICK SWAN, JR. IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER [CCP § 2025.420]; (5) [PROPOSED] ORDER
GRANTING MOTION FOR PROTECTIVE ORDER [CCP § 2025.420];

29

on the interested parties in this action by:

30

U. S. MAIL: I placed a copy in a separate envelope, with postage fully prepaid, for
each address named on the attached service list for collection and mailing on the below

1 indicated day following the ordinary business practices at Luce, Forward, Hamilton &
 2 Scripps LLP. I certify I am familiar with the ordinary business practices of my place of
 3 employment with regard to collection for mailing with the United States Postal Service.
 4 I am aware that on motion of the party served, service is presumed invalid if postal
 cancellation date or postage meter date is more than one day after date of deposit or
 mailing affidavit.

5 **OVERNIGHT MAIL:** I sent a copy via overnight mail, Airbill
 6 No. _____.

7 **OVERNIGHT COURIER SERVICE:** I placed a copy in a separate envelope
 addressed to each addressee as indicated below, and caused such envelope(s) to be
 delivered via _____.

8 **HAND DELIVERY:** I placed a copy in a separate envelope addressed to each
 9 addressee as indicated below, and delivered it to Cal Express for personal service.

10 **FACSIMILE:** I sent a copy via facsimile transmission to the telefax number(s)
 indicated below. The facsimile machine I used complied with California Rules of
 Court, Rule 2003 and no error was reported by machine. Pursuant to California Rules
 11 of Court, Rule 2006(d), I caused the machine to print a transmission record of the
 transmission, a copy of which is attached to this declaration.

12 Cathryn Chinn
 13 1901 First Avenue, Suite 400
 San Diego, CA 92101
 Tel: (619) 234-9000
 Fax: (619) 699-1159

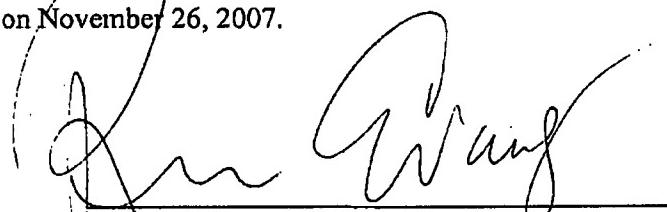
14 Peter Friesen
 15 1901 First Avenue, Suite 400
 San Diego, CA 92101
 Tel: (619) 234-9000

16 Sandra McDonough
 Paul, Plevin, Sullivan & Connaughton
 401 B Street, Tenth Floor
 San Diego, California 92101
 Tel: 619.744.3641

17 **(STATE):** I declare under penalty of perjury under the laws of the State of California
 18 that the foregoing is true and correct.

19 **(FEDERAL):** I declare that I am employed in the office of a member of the bar of this
 20 court at whose direction the service was made.

21 Executed at San Diego, California on November 26, 2007.



Renee' M. Evans

101054213.1

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3 600 West Broadway, Suite 2600
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6 Fax No.: 619.232.8311
7 E-Mail: lkouns@luce.com

8 Attorneys for Edward Patrick Swan, Jr.

9

10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT

13

14 JOSE HERNANDEZ,

15 Plaintiff,

16 v.

17 SAN DIEGO COUNTY REGIONAL
18 AIRPORT AUTHORITY, a public entity and
19 DOES 1 through 12, inclusive,

20 Defendants.

21 Case No. GIC 871979

22 **MEMORANDUM OF POINTS AND
23 AUTHORITIES IN SUPPORT OF
24 MOTION FOR PROTECTIVE ORDER
[CCP § 2025.420]**

25 Date: December 19, 2007

26 Time: 9:00 a.m.

27 Dept: 75

28 Judge: Hon. Richard E. L. Strauss

Trial Date: January 4, 2008

29

30 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

31

I.

32

33 **INTRODUCTION**

34

35 By this motion, Defendant's former attorney and third party witness, Pat Swan, seeks to avoid
36 being deposed by Plaintiff (1) on a date when he has other pre-commitments and (2) unnecessarily as
37 the deposition may be rendered moot by a pending summary judgment ruling. If the deposition
38 subpoena is quashed or mooted by summary judgment, the parties will not be required to debate, nor
39 the Court to adjudicate complex issues regarding the scope of permissible deposition questions to the
40 adverse party's former attorney and which documents in Mr. Swan's files are protected by the
41 attorney-client privilege and work product doctrine.

42

43 ///

1 The summary judgment hearing has been continued to December 14. Mr. Swan files this
2 motion to request that his deposition be postponed until after the Court rules on that potentially
3 dispositive motion, and that the scope of the documents required and questions asked be limited.

II.

FACTUAL BACKGROUND

This is a wrongful termination case filed by a former employee of Defendant San Diego County Regional Airport Authority (“Defendant”). Movant Edward Patrick Swan, Jr. (“Swan”) is a Luce Forward attorney previously hired by Defendant to conduct a confidential internal investigation into allegations that Plaintiff was accepting benefits from vendors, contractors and airlines doing business with Defendant. Mr. Swan and a private investigator conducted several interviews and submitted a written report to Defendant in January of 2006. Plaintiff was later terminated by Defendant and filed this lawsuit.

13 As early as its demurrer to the complaint, Defendant raised Government Code section 821.6 as
14 a defense to this lawsuit. In essence, this defense claims that Defendant is immune from Plaintiff's
15 claim because its decision to terminate him was an administrative proceeding. Defendant filed a
16 motion for summary judgment on August 31, 2007. It attached Mr. Swan's report to its motion. The
17 motion was scheduled for hearing on November 16, 2007. Plaintiff sought no additional discovery
18 before filing his opposition brief on November 2, 2007. He did not attempt to subpoena Mr. Swan's
19 files regarding his investigation, nor try to depose him. Then, seven days after filing his opposition,
20 Plaintiff served Mr. Swan with a deposition subpoena scheduling the deposition for November 27 and
21 requesting numerous categories of documents. Before serving the subpoena, Plaintiff did not bother
22 asking Mr. Swan if he was available on that date. As it turns out, he is not.

23 At the summary judgment hearing on November 16, the Court requested further briefing on the
24 applicability of Government Code section 821.6 and continued the hearing to December 14. If the
25 motion is granted, Mr. Swan's deposition and document production will be moot. On November 20,
26 his counsel attempted to meet and confer with Plaintiff's counsel to continue the deposition and
27 document production until after the motion is decided. On the eve of the Thanksgiving holiday, the
28 voicemail response from Plaintiff's counsel was essentially "produce the documents requested in the

1 subpoena on November 26 (one day early) and then we'll discuss whether the deposition will be
 2 continued beyond November 27." The fact that Mr. Swan had pre-commitments on November 27
 3 was ignored. Due to his other commitments and the fact that the documents requested are subject to
 4 the attorney-client privilege and attorney work product protection, this motion became necessary.

5 Accordingly, Mr. Swan asks that his deposition be postponed until after the hearing on the
 6 motion for summary judgment.

7 The Court should grant this motion because: (1) Plaintiff and his counsel have known since
 8 December 2005 that Mr. Swan conducted the investigation that preceded Plaintiff's termination
 9 (2) Plaintiff has had Mr. Swan's written investigative report and his declaration since August 31,
 10 2007, (3) Plaintiff did not seek Mr. Swan's deposition or documents until after filing his opposition to
 11 the motion for summary judgment, (4) Mr. Swan's report does not make any recommendations
 12 regarding whether to terminate Plaintiff and (5) the document request accompanying the deposition
 13 notice seeks documents clearly protected by the work product protection and attorney-client privilege.

14 III.

15 **LEGAL STANDARD**

16 This Court may issue a protective order to prevent the deposition as scheduled or at all. "The
 17 court, for good cause shown, may make any order concerning a deposition that justice requires to
 18 protect any . . . deponent . . . from unwarranted annoyance, embarrassment, or oppression, or undue
 19 burden and expense." (Code Civ. Proc. § 2025.420(b)(emphasis added.) The protective order may
 20 provide that the deposition not be taken at all, be taken at a different time, or be taken subject to
 21 certain specified terms and conditions or that certain of the writings or tangible things designated in
 22 the deposition notice not be produced, inspected or copied. (Code Civ. Proc. §§ 2025.420(b)(1),
 23 2025.420(b)(2), 2025.420(b)(11).)

24 Plaintiff was unreasonable for not clearing the deposition date with Mr. Swan's schedule. He
 25 was also unreasonable for not postponing the document production.¹ He was further unreasonable for
 26

27 ¹ The privileges that cover the subject documents may be further discussed either at the hearing or in
 28 a supplemental brief(s) to be filed by Mr. Swan and/or Defendant before the *ex parte* hearing on this
 motion scheduled for December 19, 2007.

1 not communicating whether he would continue the deposition until after the documents were
 2 produced.

3 A court must impose a monetary sanction against any party, person, or attorney who
 4 unsuccessfully opposes a motion for protective order under Code of Civil Procedure section 2025.420,
 5 absent a finding that the party subject to the sanction acted with substantial justification or that other
 6 circumstances render the imposition of sanctions unjust. (Code Civ. Proc. §§ 2023.030(a), 2025.420,
 7 2025.470.)

8 **IV.**

9 **THE COURT SHOULD QUASH THE DEPOSITION NOTICE**

10 If the motion for summary judgment is granted on December 14, this case is over and the
 11 subject deposition moot. If the motion is denied, the protective order should issue nevertheless.
 12 Plaintiff has the written report that Mr. Swan authored and delivered to Defendant. It says what it
 13 says. Thereafter, Defendant terminated Plaintiff. If Plaintiff wants to know why, he could have
 14 previously propounded interrogatories or deposed representatives of Defendant. If he doubted that
 15 Mr. Swan's sources said what the report attributes to them, he could have asked them. He did none of
 16 this. The requested deposition of Mr. Swan is nothing more than a red herring designed to create an
 17 11th hour response to Defendant's defenses.

18 Similarly, the documents that Plaintiff requests from Mr. Swan are either subsumed in the
 19 report or are privileged. Yet another red herring.

20 The fact that Plaintiff did not notice Mr. Swan's deposition or request his documents until after
 21 filing his opposition to the motion for summary judgment speaks volumes.

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1 V.

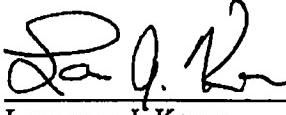
2 CONCLUSION

3 For all of the foregoing reasons, Mr. Swan requests that a protective order issue and that the
4 subpoena for and notice of his deposition be quashed. If the deposition is permitted to go forward,
5 Mr. Swan requests that it be severely limited as to both scope and duration.

6

7 DATED: November 26, 2007 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

8 By:

9 

10 Lawrence J. Kouns
11 Attorneys for Edward Patrick Swan, Jr.

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2 LUCE, FORWARD, HAMILTON & SCRIPPS LLP
3 600 West Broadway, Suite 2600
4 San Diego, California 92101-3372
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6 Fax No.: 619.232.8311
7 E-Mail: lkouns@luce.com

8 Attorneys for Edward P. Swan, Jr.

9

10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT

13

14 JOSE HERNANDEZ,

15 Plaintiff,

16 v.

17 SAN DIEGO COUNTY REGIONAL
18 AIRPORT AUTHORITY, a public entity and
19 DOES 1 through 12, inclusive,

20 Defendants.

21 Case No. GIC 871979

22 **DECLARATION OF EDWARD
23 PATRICK SWAN, JR. IN SUPPORT OF
24 MOTION FOR PROTECTIVE ORDER
25 [CCP § 2025.420]**

26 Date: December 19, 2007

27 Time: 9:00 a.m.

28 Dept: 75

Judge: Hon. Richard E. L. Strauss

Trial Date: January 4, 2008

29 I, Edward Patrick Swan, Jr., declare as follows:

30 1. I am an attorney duly licensed to practice law before all the courts of this state and
31 am a partner at Luce, Forward, Hamilton & Scripps LLP. I have personal knowledge of the facts
32 set forth herein.

33 2. I was previously hired by Defendant San Diego County Regional Airport Authority
34 ("Defendant") to conduct a confidential internal investigation into allegations that Plaintiff
35 Hernandez was accepting benefits from vendors, contractors and airlines doing business with
36 Defendant. A private investigator named John Gamberzky and I conducted several interviews,
37 and I prepared a written report to my client dated January 19, 2006. I understand that the report
38 was attached to the Defendant's motion for summary judgment filed in this case.

39

1 3. Plaintiff served me with a deposition subpoena on November 9, 2007. A true and
2 correct copy of the deposition subpoena is attached to the Notice of Lodgment as Exhibit 1. The
3 subpoena set a deposition date of November 27, 2007 and asked that I bring a number of
4 categories of documents. Almost every one of the categories of documents requested calls for
5 information covered by the attorney client privilege and/or work product doctrine. On November
6 21, 2007 my office served objections to the document requests.

7 4. Before selecting the deposition date of November 27, 2007, Plaintiff did not
8 contact me to clear the date. I have pre-commitments on November 27, 2007.

9 5. I would prefer that the deposition be rescheduled for a date after December 14,
10 2007, so that the Defendant's motion for summary judgment can first be decided.

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct and that this declaration is executed this 26th day of November, at
13 San Diego, California.

Edward P. Swan Jr.

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Recycled Paper



1 Lawrence J. Kouns, State Bar No. 095417
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9

10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 FOR THE COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT

13

14 JOSE HERNANDEZ,

15 Plaintiff,

16 v.

17 SAN DIEGO COUNTY REGIONAL
18 AIRPORT AUTHORITY, a public entity and
19 DOES 1 through 12, inclusive,

20 Defendants.

21 Case No. GIC 871979

22 **DECLARATION OF LAWRENCE J.
KOUNS IN SUPPORT OF MOTION FOR
PROTECTIVE ORDER [CCP § 2025.420]**

23 Date: December 19, 2007

24 Time: 9:00 a.m.

25 Dept: 75

26 Judge: Hon. Richard E. L. Strauss

27 Trial Date: January 4, 2008

28

I, Lawrence J. Kouns, declare as follows:

1. I am an attorney duly licensed to practice law before all the courts of this state and
2. am a partner at Luce, Forward, Hamilton & Scripps LLP. In this matter, I am representing my
3. partner, Edward Patrick Swan, Jr. Unless indicated otherwise, I have personal knowledge of the
4. facts set forth herein.

5. 2. I am informed and believe that Defendant filed a motion for summary judgment on
6. August 31, 2007. Plaintiff's opposition was filed and served on November 2, 2007. The reply
7. brief was filed and served on November 9, 2007. The hearing was scheduled for November 16,
8. 2007.

9. ///

10. ///

1 3. Seven days after filing his opposition, Plaintiff served a deposition subpoena on
2 Mr. Swan on November 9, 2007. The deposition date unilaterally selected by Plaintiff was
3 November 27, 2007 (eleven days after the original hearing on the motion for summary judgment).
4 A true and correct copy of the deposition subpoena is attached to the Notice of Lodgment as
5 Exhibit 1. The subpoena asked that Mr. Swan bring a number of categories of documents.
6 Almost every one of the categories of documents requested calls for information covered by the
7 attorney client privilege and/or work product doctrine. The deposition date was not convenient for
8 Mr. Swan, due to other commitments.

9 4. I tried to resolve this informally. On November 20, 2007, I telephoned Attorney
10 Chinn's office to request that the deposition be rescheduled. She was not available so I spoke with
11 her assistant, Sylvia. I explained that November 27, 2007 was not a convenient date for the
12 deposition and requested that a new date be selected. I suggested it be after December 14, 2007,
13 the date the summary judgment motion is now scheduled to be heard. I explained that if the
14 Defendant's motion is granted, the case will be over and the deposition will not be necessary. I
15 said that if the motion is denied, I would make Mr. Swan available within a couple of days after
16 December 14, 2007. Sylvia called me back later in the day and left a voicemail. The voicemail
17 stated that Ms. Chinn wanted Mr. Swan to produce the documents on November 26, 2007 and then
18 she would let him know whether she would agree to a rescheduling of his deposition set for
19 November 27, 2007. That proposal was not acceptable. It would require us to spend the
20 Thanksgiving Holiday reviewing all of the documents for privilege and then finding out on the
21 26th whether the deposition is going forward on the 27th, a date that is not good for Mr. Swan.

22 5. On November 21, 2007 I served objections to the document requests. A true and
23 correct copy of the objections is attached to the Notice of Lodgment as Exhibit 2.

24 6. On November 26, 2007 I messengered a letter to Ms. Chinn informing her that the
25 deposition noticed for November 27, 2007 would not go forward. A true and correct copy of the
26 objections is attached to the Notice of Lodgment as Exhibit 3.

27 ///
28 ///

I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct and that this declaration is executed this 26th day of November, at San
Diego, California.



Lawrence J. Kouns

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8 Attorneys for Edward P. Swan, Jr.

9

10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 FOR THE COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT

13

14 JOSE HERNANDEZ,

15 Plaintiff,

16 v.

17 SAN DIEGO COUNTY REGIONAL
18 AIRPORT AUTHORITY, a public entity and
19 DOES 1 through 12, inclusive,

20 Defendants.

21 Case No. GIC 871979

22 NOTICE OF LODGMENT RE MOTION
23 FOR PROTECTIVE ORDER [CCP
24 § 2025.420]

25 Date: December 19, 2007

26 Time: 9:00 a.m.

27 Dept: 75

28 Judge: Hon. Richard E. L. Strauss

Trial Date: January 4, 2008

29

30 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

31 PLEASE TAKE NOTICE that third party Edward P. Swan, Jr. hereby lodges the following
32 exhibits in support of his motion for protective order with regard to the Deposition Subpoena For
33 Personal Appearance and Production of Documents And Things.

34 ///

35 ///

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- 1 Exhibit 1: Deposition Subpoena For Personal Appearance and Production of Documents
2 And Things;
3 Exhibit 2: Third Party Edward P. Swan, Jr.'s Objections to Plaintiff Jose Hernandez'
4 Deposition Subpoena for Personal Appearance and Production of Documents and Things.
5 Exhibit 3: Lawrence J. Kouns' letter dated November 26, 2007 to Cathryn Chinn.

6

7 DATED: November 26, 2007 LUCE, FORWARD, HAMILTON & SCRIPPS LLP

8

9 By: 
10 Lawrence J. Kouns
11 Attorneys for Edward P. Swan, Jr.

12 101054270.1

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Exhibit 1

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name) *CATHRYN CHINN, ESQ.* Bar number, and address: *State Bar 93340
1901 First Avenue Ste. 400 San Diego, CA 92101*

FOR COURT USE ONLY

TELEPHONE NO.: (619) 234-9000 FAX NO. (Optional): (619) 699-1159

E-MAIL ADDRESS (Optional):

ATTORNEY FOR (Name): Plaintiff JOSE HERNANDEZ

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

STREET ADDRESS: 330 W. Broadway

MAILING ADDRESS: San Diego, CA 92101

CITY AND ZIP CODE:

BRANCH NAME: Central Branch

PLAINTIFF/DEFENDANT: JOSE HERNANDEZ

DEFENDANT: SAN DIEGO COUNTY REGIONAL AIRPORT AUTHORITY

**DEPOSITION SUBPOENA
FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS**

CASE NUMBER:
GIC 871979

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):

(619) 699-2415

Edward P. Pat Swan, Jr.
Luce Forward Hamilton & Scripps, 600 W. Broadway #2600
San Diego, CA 92101

1. YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:

Date: Nov. 27, 2007 Time: 10:00 a.m. Address: 530 B St., Ste. 350, San Diego, CA 92101

- a. As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in Item 4. (Code Civ. Proc., § 2025.220(a)(8)).
 - b. You are ordered to produce the documents and things described in Item 3.
 - c. This deposition will be recorded stenographically through the instant visual display of testimony, and by audiotape videotape
 - d. This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).
2. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
3. The documents and things to be produced and any testing or sampling being sought are described as follows:

SEE ATTACHED NOTICE OF DEPOSITION

 Continued on Attachment 3.

4. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are described as follows:

 Continued on Attachment 4.

5. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.
6. At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: November 5, 2007

CATHRYN CHINN

(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON ISSUING SUBPOENA)

Attorney for Plaintiff JOSE HERNANDEZ

(TITLE)

Page 1 of 2

Form Adopted for Mandatory Use
Judicial Council of California
SUBP-020 (Rev. January 1, 2007)

**DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE
AND PRODUCTION OF DOCUMENTS AND THINGS**

Code of Civil Procedure,
§§ 2020.510, 2025.220, 2025.620;
Government Code, § 58097.1
www.courtinfo.ca.gov

American LegalNet, Inc.

1 Cathryn Chinn, Esq. (State Bar 93340)
1901 First Avenue, Suite 400
2 San Diego, California 92101
Telephone (619) 234-9000
3 Facsimile (619) 699-1159

4

5 Attorney for Plaintiff
JOSE HERNANDEZ

6

7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF SAN DIEGO, CENTRAL BRANCH, GENERAL UNLIMITED**

10 JOSE HERNANDEZ,

Case No. : GIC 871979

11 Plaintiff,

12 v.

13 SAN DIEGO COUNTY REGIONAL
14 AIRPORT AUTHORITY, a public entity
and DOES 1 through 12, Inclusive,

PLAINTIFF JOSE HERNANDEZ' NOTICE
OF DEPOSITION OF WITNESS EDWARD
P. PAT SWAN, JR., AND DOCUMENTS TO
BE PRODUCED AT DEPOSITION

15 Defendants.

16

17

18

19

20 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

21 PLEASE TAKE NOTICE that Plaintiff JOSE HERNANDEZ will take the deposition of
22 witness Edward P. Pat Swan, Jr., address Luce, Forward, Hamilton & Scripps, LLP, 600 West
23 Broadway, Ste. 2600, San Diego, California 92101, telephone (619) 699-2415.

24 The deposition will be taken at the offices of Peterson Court Reporting, 530 B St., Ste. 350,
25 San Diego, California 92101, telephone (619) 234-9000, before the presence of a certified court
26 reporter. The deposition will be taken on November 27, 2007, at 10:00 a.m.

27 The deposition will continue from day to day, weekends and holidays excluded, until
28 completed. The deposition may be recorded by audiotape or videotape, in addition to recording the

1 testimony by a certified stenographic reporter.

2 NOTICE IS FURTHER GIVEN that if an interpreter is required to translate testimony, notice
3 of same must be given to this noticing party at least five (5) working days prior to the deposition
4 date, and the specific language and/or dialect designated.

5 The deposition will be taken pursuant to the provisions of Code of Civil Procedure §
6 2025.010, et seq., and is based on the files, records and papers in the above-entitled action.

7 Also, deponent is required to produce the following ORIGINAL documents at the
8 deposition:

9 I.

10 **DEFINITIONS AND INSTRUCTIONS**

11 As used herein, the following definitions shall apply:

12 “DOCUMENTS” means, without limitation, all media on which information is stored or
13 recorded including, but not limited to, writings, drawings, graphs, charts, maps, studies, photographs,
14 phone records, memoranda, insurance policy, certificates of insurance, endorsements, manuals,
15 claims file entries, log books, ledgers, handwritten notes, interoffice memoranda, letters,
16 computerized records, electronic mail entries, electronic diary entries, and other data compilations
17 from which information can be obtained, translated, if necessary, by the respondent through detection
18 devices into reasonably usable form.

19 “YOU,” “YOUR” and “YOURS” refer to Defendant SAN DIEGO COUNTY REGIONAL
20 AIRPORT AUTHORITY and its present or former employees, agents, officers, directors,
21 representatives, attorneys, and all other persons acting or purporting to act on its behalf.

22 It is not Plaintiff’s intention to request the production of privileged materials. If any
23 materials requested are claimed to be privileged, please describe:

24 a. The nature and contents of the matter claimed to be privileged;

25 b. The name and job title of the person(s) from whom the alleged privileged matter was
26 directed;

27 c. The name and job title of the person(s) to whom the alleged privileged matter was
28 directed;

1 d. The date of the item; and
2 e. The legal basis for the claim or privilege.

三

DOCUMENTS / ITEMS TO BE PRODUCED

- 5 1. All notes, memoranda, reports, letters, and audio recordings, including those of John
6 Gambersky, reflecting, mentioning or otherwise pertaining to an investigation of Jose
7 Hernandez' alleged violation(s) of ethical rules.

8 2. All notes, memoranda, electronic mail, reports, letters, or other oral communications, and
9 audio recordings reflecting, mentioning or otherwise pertaining to conversations with all
10 officers, directors, agents and/or employees of the Airport Authority including, but not
11 limited to, Thella Bowens, Ted Sexton, Brian Enarson, Jeffrey Woodson, John Gamberzky
12 Diane Richards, Clifforine Massey, and Jim Prentice.

13 3. All time records **YOU** have generated or maintained referencing or reflecting the time **YOU**
14 have spent working on, investigating, research and/or evaluating the conduct of Jose
15 Hernandez.

16 4. All time records **YOU** have generated or maintained referencing or reflecting the time **YOU**
17 have spent working on, investigating, research and/or evaluating Airport Authority
18 individuals other than Jose Hernandez for possible ethical violations.

19 5. The complete electronic folder(s) and/or subdirectory(s) which contain(s) the computerized
20 record of the final version of **YOUR** report on Hernandez, as well as all rough drafts of that
21 report.

22 6. All transcripts of audio recordings of any and all conversations pertaining to the investigation
23 of Jose Hernandez.

24 7. The complete contents of all files regarding **YOUR** investigation of Jose Hernandez.

25 8. All **DOCUMENTS** that reflect **YOUR** training, education and certification as an
26 investigator.

27 | DATED: November 5, 2007

~~CATHRYN CHINN, Attorneys for Plaintiff JOSE HERNANDEZ~~

Exhibit 2

1 Lawrence J. Kouns, State Bar No. 095417
2 LUCE, FORWARD, HAMILTON & SCRIPPS LLP
3 600 West Broadway, Suite 2600
4 San Diego, California 92101-3372
5 Telephone No.: 619.236.1414
6 Fax No.: 619.232.8311
7 E-Mail: lkouns@luce.com

8 Attorneys for Edward P. Swan, Jr.

9

10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT

13

14 JOSE HERNANDEZ,,

15 Plaintiff,

16 v.

17 SAN DIEGO COUNTY REGIONAL
18 AIRPORT AUTHORITY, a public entity and
19 DOES 1 through 12, inclusive,,

20 Defendants.

21 Case No. GIC 871979

22 **THIRD PARTY EDWARD P. SWAN,
23 JR.'S OBJECTIONS TO PLAINTIFF
24 JOSE HERNANDEZ' DEPOSITION
25 SUBPOENA FOR PERSONAL
26 APPEARANCE AND PRODUCTION OF
27 DOCUMENTS AND THINGS**

28 Date: November 27, 2007

Time: 10:00 a.m.

29

30 Third Party Edward P. Swan, Jr. ("Swan") hereby objects to the Plaintiff's Deposition
31 Subpoena for Personal Appearance and Production of Documents and Things:

32 **GENERAL OBJECTIONS**

33 1. Swan objects generally to each and every request on the grounds that it is vague,
34 ambiguous, overly broad, burdensome, oppressive, harassing and not reasonably calculated to lead the
35 discovery of admissible evidence.

36 2. Swan objects generally to each and every request on the grounds that the subpoena is
37 burdensome and oppressive in that it is overly broad and fails to identify with sufficient specificity the
38 documents sought.

39 ///

40 ///

1 3. Swan objects generally to each and every request on the grounds that the subpoena is
2 overbroad and calls for the production of documents that are protected by the attorney/client and/or
3 work product privilege.

RESPONSE TO SPECIFIC REQUESTS

5 | REQUEST FOR PRODUCTION NO. 1:

All notes, memoranda, reports, letters, and audio recordings, including those of John Gamberzky, reflecting, mentioning or otherwise pertaining to an investigation of Jose Hernandez' alleged violation(s) of ethical rules.

9 | RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

10 This request is objected to on the grounds stated in the general objections set forth above and
11 on the basis that the request seeks documents and information subject to and protected by the attorney
12 client privilege and attorney work product doctrine.

13 | REQUEST FOR PRODUCTION NO. 2:

14 All notes, memoranda, electronic mail, reports, letters, or other oral communications, and
15 audio recordings reflecting, mentioning or otherwise pertaining to conversations with all officers,
16 directors, agents and/or employees of the Airport Authority including, but not limited to, Thella
17 Bowens, Ted Sexton, Brian Enarson, Jeffrey Woodson, John Gamberzky, Diane Richards, Clifforine
18 Massey, and Jim Prentice.

19 | RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

20 This request is objected to on the grounds stated in the general objections set forth above and
21 on the basis that the request seeks documents and information subject to and protected by the attorney
22 client privilege and attorney work product doctrine. In addition, this request is overbroad, seeks
23 confidential information and is not reasonably calculated to lead to the discovery of admissible
24 evidence as it is not limited to communications regarding plaintiff in this case.

25 | REQUEST FOR PRODUCTION NO. 3:

26 All time records YOU have generated or maintained referencing or reflecting the time YOU
27 have spent working on, investigating, research and/or evaluating the conduct of Jose Hernandez.

28 | //

1 RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

2 This request is objected to on the grounds stated in the general objections set forth above and
 3 on the basis that the request seeks documents and information subject to and protected by the attorney
 4 client privilege and attorney work product doctrine. In addition, the subject time records contain
 5 information involving clients other than those involved in this case.

6 REQUEST FOR PRODUCTION NO. 4:

7 All time records YOU have generated or maintained referencing or reflecting the time YOU
 8 have spent working on, investigating, research and/or evaluating Airport Authority individuals other
 9 than Jose Hernandez for possible ethical violations.

10 RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

11 This request is objected to on the grounds stated in the general objections set forth above and
 12 on the basis that the request seeks documents and information subject to and protected by the attorney
 13 client privilege and attorney work product doctrine. In addition, the subject time records contain
 14 information involving clients other than those involved in this case.

15 REQUEST FOR PRODUCTION NO. 5:

16 The complete electronic folder(s) and/or subdirectory(s) which contain(s) the computerized
 17 record of the final version of YOUR report on Hernandez, as well as all rough drafts of that report.

18 RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

19 This request is objected to on the grounds stated in the general objections set forth above and
 20 on the basis that the request seeks documents and information subject to and protected by the attorney
 21 client privilege and attorney work product doctrine.

22 REQUEST FOR PRODUCTION NO. 6:

23 All transcripts of audio recordings of any and all conversations pertaining to the investigation
 24 of Jose Hernandez.

25 RESPONSE TO REQUEST FOR PRODUCTION NO. 6:

26 This request is objected to on the grounds stated in the general objections set forth above and
 27 on the basis that the request seeks documents and information subject to and protected by the attorney
 28 client privilege and attorney work product doctrine.

1 **REQUEST FOR PRODUCTION NO. 7:**

2 The complete contents of all files regarding YOUR investigation of Jose Hernandez.

3 **RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

4 This request is objected to on the grounds stated in the general objections set forth above and
5 on the basis that the request seeks documents and information subject to and protected by the attorney
6 client privilege and attorney work product doctrine.

7 **REQUEST FOR PRODUCTION NO. 8:**

8 All DOCUMENTS that reflect YOUR training, education and certification as an investigator.

9 **RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

10 This request is objected to on the grounds stated in the general objections set forth above and
11 on the basis that the request is unlimited as to time or breadth and may seek documents and
12 information subject to and protected by the attorney client privilege and attorney work product
13 doctrine.

15 DATED: November 21, 2007

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

16 By 
17

Lawrence J. Kouns
Attorneys for Edward P. Swan, Jr.

19 101053713.1

20
21
22
23
24
25
26
27
28

1 Lawrence J. Kouns, State Bar No. 095417
2 LUCE, FORWARD, HAMILTON & SCRIPPS LLP
3 600 West Broadway, Suite 2600
4 San Diego, California 92101-3372
5 Telephone No.: 619.236.1414
6 Fax No.: 619.232.8311
7 E-Mail: lkouns@luce.com

8 Attorneys for Edward P. Swan, Jr.

9

10

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT

13

14 JOSE HERNANDEZ,,

15 Case No. GIC 871979

16 Plaintiff,

17 v.
18 PROOF OF SERVICE

19 SAN DIEGO COUNTY REGIONAL
20 AIRPORT AUTHORITY, a public entity and
21 DOES 1 through 12, inclusive,,

22 Defendants.

23

I, Renee' M. Evans, declare as follows:

24

I am employed with the law firm of Luce, Forward, Hamilton & Scripps LLP, whose address is
600 West Broadway, Suite 2600, San Diego, California 92101-3372. I am over the age of eighteen
years, and am not a party to this action.

25

On November 21, 2007, I served the following:

26

27 **THIRD PARTY EDWARD P. SWAN, JR.'S OBJECTIONS TO PLAINTIFF JOSE
28 HERNANDEZ' DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND
PRODUCTION OF DOCUMENTS AND THINGS**

on the interested parties in this action by:

29

U. S. MAIL: I placed a copy in a separate envelope, with postage fully prepaid, for
each address named on the attached service list for collection and mailing on the below
indicated day following the ordinary business practices at Luce, Forward, Hamilton &
Scripps LLP. I certify I am familiar with the ordinary business practices of my place of
employment with regard to collection for mailing with the United States Postal Service.
I am aware that on motion of the party served, service is presumed invalid if postal

30
PROOF OF SERVICE

1 cancellation date or postage meter date is more than one day after date of deposit or
2 mailing affidavit.

3 _____
OVERNIGHT MAIL: I sent a copy via overnight mail, Airbill
No. _____

4 _____
OVERNIGHT COURIER SERVICE: I placed a copy in a separate envelope
5 addressed to each addressee as indicated below, and caused such envelope(s) to be
delivered via _____.

6 XX _____
HAND DELIVERY: I placed a copy in a separate envelope addressed to each
7 addressee as indicated below, and delivered it to Cal Express for personal service.

8 _____
FACSIMILE: I sent a copy via facsimile transmission to the telefax number(s)
9 indicated below. The facsimile machine I used complied with California Rules of
Court, Rule 2003 and no error was reported by machine. Pursuant to California Rules
of Court, Rule 2006(d), I caused the machine to print a transmission record of the
transmission, a copy of which is attached to this declaration.

10 Cathryn Chinn
11 1901 First Avenue, Suite 400
12 San Diego, CA 92101
Tel: (619) 234-9000
Fax: (619) 699-1159

Sandra McDonough
Paul, Plevin, Sullivan & Connaughton
401 B Street, Tenth Floor
San Diego, California 92101
Tel: 619.744.3641

14 XX _____
(STATE): I declare under penalty of perjury under the laws of the State of California
15 that the foregoing is true and correct.

16 _____
(FEDERAL): I declare that I am employed in the office of a member of the bar of this
court at whose direction the service was made.

17 Executed at San Diego, California on November 21, 2007.

21 _____
Renee' M. Evans

22 101054213.1

Exhibit 3

LUCE FORWARD
ATTORNEYS AT LAW • FOUNDED 1873
LUCE, FORWARD, HAMILTON & SCRIPPS LLP

600 West Broadway
Suite 2600
San Diego, CA 92101
619.236.1414
619.232.8311 fax
www.luce.com

LAWRENCE J. KOUNS, PARTNER
DIRECT DIAL NUMBER 619.699.2437
DIRECT FAX NUMBER 619.645.5359
EMAIL ADDRESS lkouns@luce.com

November 26, 2007

HAND-DELIVERED

Cathryn Chinn
1901 First Avenue, Suite 400
San Diego, CA 92101

Re: Hernandez v. San Diego County Regional Airport Authority, et. al.

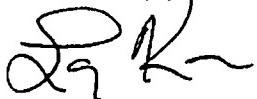
Dear Ms. Chinn:

I represent Pat Swan in connection with the deposition subpoena you served on him in the above-referenced case.

You subpoenaed him for a date on which he had other commitments. You also requested that he produce privileged documents. I telephoned your office on November 20th to attempt to resolve this informally. You were out so I spoke with your assistant, Sylvia. I suggested we reschedule the deposition to a date after the Defendant's motion for summary judgment is heard on December 14. I said the ruling on the motion might moot the deposition. If it did not, I said Mr. Swan could be deposed within a couple of days of the hearing.

Sylvia discussed this with you and then left me a voicemail. Your response was that we should produce the requested documents today and you would then let us know if you would postpone tomorrow's deposition. That was not acceptable. Sylvia phoned back this morning and said that Mr. Friesen plans to go ahead with the deposition tomorrow. I am filing a motion for a protective order today. The first available hearing on the Court's calendar is December 19, 2007. The deposition you noticed for tomorrow will not go forward as scheduled.

Very truly yours,



Lawrence J. Kouns
of
LUCE, FORWARD, HAMILTON & SCRIPPS LLP

LJK/rme
cc: Peter Friesen
Sandra McDonough
101054367.1

Recycled Paper



SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO, SAN DIEGO JUDICIAL DISTRICT

JOSE HERNANDEZ,

Plaintiff,

v.

SAN DIEGO COUNTY REGIONAL
AIRPORT AUTHORITY, a public entity and
DOES 1 through 12, inclusive,

Defendants.

Case No. GIC 871979

**[PROPOSED] ORDER GRANTING
MOTION FOR PROTECTIVE ORDER
[CCP § 2025.420]**

Date: December 19, 2007

Time: 9:00 a.m.

Dept: 75

Judge: Hon. Richard E. L. Strauss

Trial Date: January 4, 2008

Third Party witness Edward P. Swan, Jr.'s Motion for Protective Order came on regularly for hearing before the above-entitled Court on December 19, 2007 at 9:00 a.m. Luce, Forward Hamilton & Scripps LLP appeared on behalf of Swan, Cathryn Chinn, appeared on behalf of Plaintiff Jose Hernandez and Sandra McDonough of Paul, Plevin, Sullivan & Connaughton appeared on behalf of San Diego County Regional Airport Authority.

After considering the motion, the opposition, and all other matters presented to the Court, and good cause appearing,

IT IS HEREBY ORDERED that the motion for protective order is GRANTED. The deposition notice and accompanying document requests propounded by Plaintiff on Swan are quashed.

Dated: _____

101054226.1

Judge of the Superior Court

1 FRED M. PLEVIN (SBN 126185)
2 SANDRA L. McDONOUGH (SBN 193308)
3 ALBERT R. LIMBERG (SBN 211110)
4 PAUL, PLEVIN, SULLIVAN & CONNAUGHTON LLP
5 401 B Street, Tenth Floor
6 San Diego, California 92101-4232
7 Telephone: 619-237-5200
8 Facsimile: 619-615-0700

F I L E D

Clerk of the Superior Court

NOV 23 2007

By: M. WONG-JIMENEZ, Deputy

NOV 25 2007 PM 422

RETURN
TO ATTORNEY

9
10 Attorneys for Defendant
11 SAN DIEGO COUNTY REGIONAL AIRPORT
AUTHORITY

12

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN DIEGO

15 JOSE HERNANDEZ,

CASE NO. GIC871979

16 Plaintiff,

DEFENDANT SAN DIEGO COUNTY
REGIONAL AIRPORT AUTHORITY'S
SUPPLEMENTAL BRIEF REGARDING
GOVERNMENT CODE SECTION 821.6 IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE, SUMMARY
ADJUDICATION

17 v.

18 SAN DIEGO COUNTY REGIONAL
19 AIRPORT AUTHORITY, a public entity;
and DOES 1 through 12, inclusive,

20 Defendants.

21 Date: December 14, 2007
22 Time: 1:30 p.m.
23 Dept: 75
24 Judge: Hon. Richard E. Strauss
Complaint Filed: September 1, 2006
Trial Date: January 4, 2008

25 EXEMPT FROM FEES
GOVT. CODE § 6103

26

27

28

PAUL, PLEVIN,
SULLIVAN &
CONNAUGHTON LLP

SUPPLEMENTAL BRIEF IN SUPPORT OF
SUMMARY JUDGMENT MOTION

1 I.

2 INTRODUCTION AND SUMMARY OF ARGUMENT

3 Defendant San Diego County Regional Airport Authority (the "Authority") submits this
 4 supplemental brief pursuant to the Court's order on November 16, 2007. This brief, as ordered by
 5 the Court, addresses the narrow issue of the applicability of Government Code section 821.6¹ to
 6 the Authority's official investigation of Hernandez' conduct of improperly receiving benefits from
 7 Authority vendors. Since the Authority's investigation was an "administrative proceeding" as
 8 defined by the case law interpreting Section 821.6, the immunity of Section 821.6 applies.

9 Hernandez bases this entire action on his contention that the Authority initiated an unfair
 10 investigation, which ultimately resulted in his termination. (Second Amended Complaint ¶¶ 23-
 11 30.) The Authority's actions in initiating the investigation and ultimately terminating Hernandez,
 12 however, are protected by Section 821.6's immunity, which immunizes a public employer from
 13 liability for instituting an administrative proceeding, including an investigation that results in
 14 termination from public employment. Since the investigation falls within the scope of Section
 15 821.6, Hernandez' entire cause of action is eliminated and summary judgment is appropriate.

16 II.

17 STATEMENT OF RELEVANT UNDISPUTED FACTS²

18 A. The Authority may Prosecute Violations of its Codes.

19 The Authority is a public entity created by the California legislature. (Pub. Util. Code §
 20 170002.) It has powers to adopt rules and regulations for its administration. (Pub. Util. Code §
 21 170042.)³ Pursuant to those powers, the Authority enacted a series of Codes and Policies,
 22 including an Ethics Code, to govern and regulate the conduct of Authority employees and ensure
 23 compliance with state law regarding benefits received by public officials under the California

24

1 All further statutory references are to the Government Code, unless otherwise noted.

25 2 For a more complete version of the undisputed facts, please see the Authority's moving papers and the
 26 separate statement of undisputed facts submitted by the Authority.

27 3 While this section was repealed on October 5, 2007, it was in effect during the 2005 and 2006
 28 investigation of Mr. Hernandez.

1 Political Reform Act. (Exh. 3.)³ The Legislature and the Authority have also provided that a
 2 violation of the Codes may be prosecuted as a misdemeanor. (Pub. Util. Code § 170042, subd.
 3 (c); Exh. 7, p. 12.)

4 Under the Authority's Ethics Code, employees of the Authority are prohibited from
 5 accepting benefits aggregating more than one-half the amount permitted under the California
 6 Political Reform Act in any calendar year (\$180 in 2005; \$170 in 2003 or 2004) from any source
 7 that the employee knows or should know is doing business with the Authority, or intends to do
 8 business with the Authority, or has done business with the Authority during the previous 12
 9 months, or that the employee knows or should know has or is seeking a license, permit, grant or
 10 benefit from the Authority, or that the employee knows or should know is an agent of such a
 11 person or entity. (See Exh. 3, pp. 12-13 [Ethics Code, Art. 2, Part 2.0, Section 2.10(b)(3)].) In
 12 addition, the Code prohibits an employee from accepting anything of value from anyone, other
 13 than the Authority or another board member or employee, for "doing his or her job." (*Id.* at
 14 Section 2.10(b)(2).)

15 **B. Certain Authority Employees Must Also Comply With the California Political
 16 Reform Act.**

17 The California Political Reform Act (Gov. Code, § 81000, et seq.) requires that certain
 18 public employees file public, personal financial disclosure reports known as "statements of
 19 economic interests" on a form known as Form 700. Each government agency is required to adopt
 20 and implement a separate conflict of interest code under the California Political Reform Act. The
 21 Authority's Ethics Code contains such a Conflict of Interest code. (See Section 2.30 of
 22 Authority's Code [Exh. 3, pp. 25-29].)

23 Under the California Political Reform Act and Section 2.30 of the Authority's Ethics
 24 Code, Hernandez was required, as a Director at the Authority, to report annually on Form 700 all
 25 income and gifts received from vendors. (See Exh. 3, pp. 25-29; Russell Dec. ¶ 5.) Hernandez

26 ³ All referenced exhibits are attached to the Notice of Lodgment of Exhibits filed by the Authority with its
 27 moving papers in support of the Authority's motion for summary judgment on August 31, 2007.

28

1 only filed one Form 700 during his employment, and he checked the box that he had no
 2 "reportable interests" for the period of 12/14/2004 through 12/31/04. (Exh. 8.) Hernandez did
 3 not file another Form 700 until after the Authority terminated his employment following its
 4 investigation of Hernandez for accepting gifts in violation of the Ethics Code. (Exh. 9.)

5 **C. The Authority Investigates Hernandez for Alleged Violations of the Ethics Code.**

6 In November or December 2005, Thella Bowens, the President and Chief Executive
 7 Officer of the Authority, received complaints from two different Authority employees about
 8 potential violations by Hernandez of the Authority's Ethics Code. (Bowens Dec. ¶ 4.)

9 Bowens, as President and CEO of the Authority, initiated an investigation into the
 10 allegations against Hernandez by hiring an outside law firm to conduct the investigation.
 11 (Authority's Undisputed Material Fact ("AUMF") ¶ 4.) Pat Swan, a former Assistant U.S.
 12 Attorney from Luce, Forward, conducted the investigation with assistance from a former FBI
 13 agent, John Gamberzky.⁴ (Swan Dec. ¶ 2; Gamberzky Dec. ¶ 2.) Swan and Gamberzky
 14 interviewed over one dozen individuals and reviewed numerous documents in connection with the
 15 investigation. (Exh. 4.) Swan summarized his findings from the investigation in a 19-page report
 16 to the Authority's CEO, Bowens. (Exh. 4.) In those findings, Swan concluded that Hernandez'
 17 actions violated the Authority's Ethics Code and that Hernandez did not report all benefits that he
 18 received on Form 700. (*Ibid.*) The very purpose of the Ethics Code is to ensure public
 19 confidence in the integrity of the Authority's practices, and Hernandez had violated that
 20 confidence through his receipt of benefits. (Exh. 3, p. 1 [Section 2.01(b)].) Hernandez was
 21 thereafter terminated as a result of the findings of the investigation (Bowens Dec. ¶ 9), and he
 22 brought this action based on the Authority's investigation of his alleged violations of the
 23 Authority's Codes.

24

25

26

27 ⁴ Bowens has the authority to delegate that investigation to another person, such as Pat Swan. (Exh. 7, p.
 28 6.)

III.

**GOVERNMENT CODE SECTION 821.6 IMMUNIZES PUBLIC EMPLOYEES
INVOLVED IN EMPLOYEE DISCIPLINARY PROCEEDINGS**

4 Government Code section 821.6 immunizes public employees for injuries caused by their
5 “instituting or prosecuting any judicial or administrative proceeding within the scope of [their]
6 employment, even if [they] act maliciously and without probable cause.” (Gov. Code, § 821.6.)
7 Where the public employee is immune under Section 821.6, the employer is also immune. (See
8 Gov. Code § 815.2(b).) As more fully stated below, the definition of an “administrative
9 proceeding” is broad and includes official investigations, such as the Ethics Code investigation
10 regarding Hernandez.

Courts have widely applied Section 821.6 immunity not only to peace officers and prosecutors, but also to public school officials (*Hardy v. Vial* (1957) 48 Cal.2d 577, 583), heads of administrative departments (*White v. Towers* (1951) 37 Cal.2d 727, 731), social workers (*Gensburg v. Miller* (1994) 31 Cal.App.4th 512, 518), county coroners (*Stearns v. County of Los Angeles* (1969) 275 Cal.App.2d 134, 137), members of county boards of supervisors (*Dawson v. Martin* (1957) 150 Cal.App.2d 379, 382) and county directors (*Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1435-1437), all of whom have participated in either the initial, middle, or final stages of an administrative proceeding, including the investigations that can lead up to a prosecutorial proceeding. (*Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 901.)

20 Section 821.6 immunity promotes the efficient operation of government by allowing
21 public employees to effectively investigate and take whatever additional personnel action
22 necessary in the proper discharge of their duties. Under Section 821.6, "immunity, even from
23 wrongfully motivated action, is granted, as a matter of public policy, to avoid the risk of public
24 officers avoiding their public duty for fear of the burden of trial and risk of its outcome."
25 (*Citizen's Capital Corp. v. Spohn* (1982) 133 Cal.App.3d 887, 889, quoting *Hardy v. Vial* (1957)
26 48 Cal.2d 577, 572-583.) Without such protection, not only would the courts be clogged with
27 lawsuits such as those brought by Hernandez, but only the most fearless or foolish of public
28 employees would: (1) accept government employment; and (2) complete their duties relating to

1 discipline, demotion or discharge.

2 Here, it is undisputed that Bowens received reports from two different employees that
 3 Hernandez may have been accepting gifts from vendors, in violation of the Authority's Ethics
 4 Code and potentially, state law. As the Authority's CEO, she had to decide whether to launch an
 5 investigation of Hernandez' conduct, and what action to take in response to the investigatory
 6 findings. As noted by the wide variety of cases in which Section 821.6 immunity has been
 7 applied, these are exactly the types of decisions that Bowens, as a public official, should be
 8 encouraged to make without the "constant dread" of being sued. (*Hardy, supra*, 48 Cal.2d at 582-
 9 583.) Accordingly, the investigation and resulting discipline of Hernandez are, in and of
 10 themselves, "administrative proceedings" as that term is defined in Section 821.6.

11 However, even if this Court finds that there must be a more formal "proceeding" beyond
 12 the investigation itself in order to qualify as an administrative proceeding under Section 821.6, the
 13 investigation is part of the prosecutorial process available under the Authority's Codes or the
 14 California Political Reform Act and, as such, the immunity applies to the investigation as part of a
 15 larger prosecutorial process. Either way, the immunity applies to Hernandez' investigation and
 16 termination, and summary judgment is appropriate. Further, application of the immunity serves
 17 the broader purpose of Section 821.6 in that it encourages the Authority to investigate possible
 18 violations of its own Codes and the Political Reform Act, without fear of retaliation or reprisal.

19 **A. An Administrative or Judicial Proceeding Includes Employee Investigations.**

20 Courts have routinely held that an investigation of a public employee, and any resulting
 21 discipline or termination, qualifies as an "administrative proceeding" under Section 821.6, and
 22 therefore the immunity applies. (E.g., *Kemmerer v. County of Fresno, supra*, 200 Cal.App.3d at
 23 pp. 1435-1437 [county and its employees immune from tort liability for alleged defamatory
 24 statements made in investigation, disciplinary notices and during disciplinary hearing]; *Summers*
 25 *v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1064-1065 [city and its employees
 26 immune from tort liability for actions in connection with employee's termination]; *Kayfetz v.*
 27 *State of Cal.* (1984) 156 Cal.App.3d 491, 496-499 [state and public employee immune from libel
 28 for publishing employee's disciplinary action after proceeding].)

1 Notably, “[c]ourts liberally construe ‘administrative proceeding’ to include investigatory
 2 and other activities in preparation for more formal proceedings.” (*Richards v. Department of*
 3 *Alcoholic Beverages Control* (2006) 139 Cal.App.4th 304, 318.) In addition, Section 821.6
 4 applies to all investigations that could lead to an administrative or judicial proceeding, even if that
 5 proceeding never takes place. (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1293 [district
 6 attorney’s conduct was an exercise of prosecutorial discretion immunized under section 821.6
 7 even though he decided not to prosecute an action]; *Gillan v. City of San Marino* (2007) 147
 8 Cal.App.4th 1033, 1047.) Finally, Section 821.6 “is not restricted to legally trained personnel
 9 but applies to all employees of a public entity....’ [Citation.]” (*Asgari v. City of Los Angeles*
 10 (1997) 15 Cal.4th 744, 756-757.)

11 *Kemmerer* is directly on point. In *Kemmerer*, several of the County’s employees
 12 investigated a county employee who was accused of using his official position and access to
 13 confidential information to harass a resident, and thereafter initiated disciplinary action against
 14 him. (*Kemmerer, supra*, at pp. 1430-31.) The investigation led to the employee’s termination
 15 (although he was later reinstated), and the employee sued the County and individual employees on
 16 various contract and tort theories. The Court of Appeal held that the investigation came within
 17 the scope of an “administrative proceeding” as that term is used in Government Code section
 18 821.6, and defendants were therefore immune from liability. (*Id.* at p. 1437.)

19 Section 821.6 has not only been applied to investigations in the civil service setting, but
 20 the Courts have also applied it in numerous other governmental entity settings where the
 21 investigation was performed by a person charged with, or the delegatee of the person charged with,
 22 investigating potential violations of codes, policies, rules or regulations. (See e.g. *Jacqueline T.*
 23 *Alameda County Child Protective Services* (2007) 155 Cal.App.4th 456, 466-468 [a social
 24 worker’s decisions relating to an investigation regarding sexual abuse is a prosecutorial or quasi-
 25 prosecutorial decision subject to immunity under Section 821.6]; *Richards v. Department of*
 26 *Alcoholic Beverages Control, supra*, 139 Cal.App.4th 304 [the Department of Alcoholic
 27 Beverages Control was immune under Section 821.6 for its actions undertaken in an investigation
 28 related to alleged transfer of a liquor license to a new owner]; and *Javor v. Taggart* (2002) 98

1 Cal.App.4th 795, 809 [defendants who were responsible for seeking reimbursement from illegally
 2 insured employers under the Workers' Compensation Act were immune under Section 821.6 for
 3 an investigation that they conducted in the course and scope of their employment].)

4 Similarly, the investigation here was initiated by a public employer to investigate potential
 5 violations of the Authority's Codes. Bowens was specifically authorized to take any action to
 6 ensure the proper administration of the Authority, including investigating potential violations of
 7 the Ethics Code by Hernandez, a public employee. (Authority Policy No. 1.40.)⁵ Thus, the
 8 investigation, and Hernandez' resulting termination, falls squarely within the definition of an
 9 administrative proceeding as set forth in the cases above. (See also *Braun v. Chronicle*
 10 *Publishing Co.* (1997) 52 Cal.App.4th 1036, 1049 [an "official proceeding" is any "authorized,
 11 public proceeding" that is "government-sponsored."].)⁶

12 **B. Both the California Political Reform Act and the Authority's Codes Allow for
 13 Prosecution of Violations.**

14 The Authority contends that the investigation, standing alone, under *Kemmerer* and its
 15 progeny, qualifies as an administrative proceeding. However, if this court finds that the
 16 investigation must be ancillary to a more formal proceeding, the investigation in this case still
 17 falls under Section 821.6 because it was a precursor, and could be used for, a prosecution under
 18 either the Authority's Codes or the California Political Reform Act.

19 Under the California Political Reform Act ("the Act"), each agency such as the Authority
 20 is required to adopt a Conflict of Interest Code for purposes of complying with the Act. (Gov.
 21 Code § 87300.) That Conflict of Interest Code has the force and effect of law, and a violation of
 22 that Code constitutes a violation of the California Political Reform Act. (*Ibid.*) Here, the
 23

24 ⁵ Bowens also has the authority to delegate that investigation to another person, such as Pat Swan. (Exh.
 25 7, p. 6.)

26 ⁶ *Braun* applies a statute with analogous language, Code of Civil Procedure section 425.16. However, as
 27 noted in *Braun*, California Code of Civil Procedure section 425.16 is even narrower than Section 821.6
 because it requires that the official proceeding be "authorized by law." Section 821.6 does not require
 that the judicial or administrative proceeding be "authorized by law". (Compare CCP § 421.16 to Gov.
 Code § 821.6.)

1 Authority has enacted such a code as part of its Ethics Code. (Exh. 3, pp. 9-10 and 25-29.) The
 2 Act specifically provides that a knowing or willful violation of the Act (or Codes promulgated
 3 under the Act) is a misdemeanor and a proceeding to prosecute a violation of the Act is called an
 4 "administrative proceeding." (Gov. Code §§ 91000 and 91000.5.)

5 Similarly, the Public Utilities Code and the Authority's Code provide that any violation of
 6 the Authority's Code is a misdemeanor and may be prosecuted as a criminal action within four
 7 years of the violation. (Pub. Util. Code § 170042; Exh. 7, p. 12.)

8 Here, the Authority investigated whether Hernandez violated the Authority's Ethics Code,
 9 which includes the Conflict of Interest Code required by the Act, and also looked at whether
 10 Hernandez had complied with his requirements under the Act. (Exh. 4.) Although the Authority
 11 has not yet prosecuted any violation of the Code or the Act, the investigation that it conducted
 12 into the benefits that Hernandez received could serve as the precursor to any such prosecution in
 13 that it establishes the Authority's basis for initiating, or referring, such an action to the
 14 prosecuting agency. Since the investigation was ancillary to a judicial proceeding, such as a
 15 criminal proceeding to prosecute a violation of the Authority's Codes or the Act, the investigation
 16 and the resulting termination fall within the ambit of Section 821.6. (See *Amylou R. v. County of*
 17 *Riverside* (1994) 28 Cal.App.4th 1205, 1211 ["Since the acts of which *Amylou* complains are
 18 incidental to the investigation of the crimes, and since investigation is part of the prosecution of a
 19 judicial proceeding, those acts were committed in the course of the prosecution of that
 20 proceeding. Thus, each of the three elements of the immunity provided by section 821.6 is
 21 present."].)

22 IV.

23 CONCLUSION

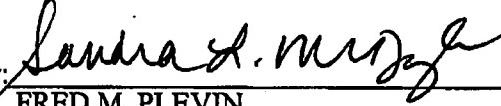
24 Since the purpose and character of the Authority's investigation was to investigate
 25 potential violations of its Ethics Code and the Act, the investigation falls within the ambit of
 26 Section 821.6 and the immunity must apply. As a result, summary judgment for the Authority is
 27 appropriate. The Authority also urges the Court to grant summary judgment and/or adjudication
 28

1 based on the additional grounds set forth in the moving and reply papers already on file with the
2 Court.

3 Dated: November 26, 2007

PAUL, PLEVIN, SULLIVAN &
CONNAUGHTON LLP

5 By:

6 
FRED M. PLEVIN

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9 Attorneys for Defendant

10 SAN DIEGO COUNTY REGIONAL
11 AIRPORT AUTHORITY

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PAUL, PLEVIN,
SULLIVAN &
CONNAUGHTON LLP

SUPPLEMENTAL BRIEF IN SUPPORT OF
SUMMARY JUDGMENT MOTION

PROOF OF PERSONAL SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of eighteen, employed in the County of San Diego, State of California, and not a party to the within-entitled action. My business address is 4665 Park Blvd., San Diego, CA 92116.

On November 26, 2007 at 4:30 - a.m./p.m., I served a true copy of the within:

- DEFENDANT SAN DIEGO COUNTY REGIONAL AIRPORT
AUTHORITY'S SUPPLEMENTAL BRIEF REGARDING GOVERNMENT
CODE SECTION 821.6 IN SUPPORT OF ITS MOTION FOR SUMMARY
JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

by delivering for personal service to the following:

Cathryn Chinn / Peter G. Friesen
1901 First Avenue, Suite 400
San Diego, CA 92101
Tel: 619-294-9183 / Fax: 619-295-4190
Attorneys for Plaintiff Jose Hernandez

I hereby certify that I am employed by Diversified Legal Services, at whose direction the personal service was made.

Executed November 26, 2007, at San Diego, California.

**DIVERSIFIED LEGAL SERVICES
MESSENGER**



1 Cathryn Chinn, Esq. (State Bar 93340)
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5 Attorney for Plaintiff
6 JOSE HERNANDEZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO, CENTRAL BRANCH, GENERAL UNLIMITED

10 JOSE HERNANDEZ,
11 Plaintiff,
12 v.
13 SAN DIEGO COUNTY REGIONAL
14 AIRPORT AUTHORITY, a public entity
and DOES 1 through 12, Inclusive,
15 Defendants

Case No. : GIC 871979

PLAINTIFF JOSE HERNANDEZ'
SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT SAN
DIEGO COUNTY REGIONAL AIRPORT
AUTHORITY'S MOTION FOR SUMMARY
JUDGMENT OR, IN THE ALTERNATIVE,
SUMMARY ADJUDICATION

DATE: December 14, 2007
TIME: 1:30 p.m.
DEPT.: 75
JUDGE: HON. RICHARD E. STRAUSS
ACTION FILED: 9/1/06
TRIAL DATE: 1/4/08

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28

PL'S SUPPL. MEMO OF P'S & A'S IN OPPOS. TO DEF SDCRAA'S MSI OR SUMM. ADJUD.

1 Plaintiff JOSE HERNANDEZ hereby submits his Supplemental Memorandum of Points and
 2 Authorities in Opposition to Defendant SAN DIEGO COUNTY REGIONAL AIRPORT
 3 AUTHORITY's Motion for Summary Judgment or, in the Alternative, Summary Adjudication:

4 **I.**

5 **INTRODUCTION**

6 Government Code § 821.6 is a statute designed to shield those charged with a specific duty
 7 to prosecute judicial or administrative actions. The problem with the Airport Authority's attempted
 8 use of this statute is that the legislature has assigned no prosecutorial function to it, and the act taken
 9 against Hernandez was not a prosecution. His employment was terminated and, since his
 10 employment was not governed by a civil service administrative process, the Authority's
 11 "investigation" of him was not part of the commencement of an administrative proceeding.

12 All of the investigations cases cited by the Airport Authority as supportive of its position
 13 involve the acts of public officials engaged in real judicial or administrative proceedings. The
 14 investigation of some public employees' potential misconduct presents immunity issues because
 15 some such investigations are preparatory to the commencement of civil service proceedings against
 16 employees under civil service protection, an activity which *Kemmerer v. City of Fresno* (1988) 200
 17 Cal.App.3d 1426 includes under § 821.6 protection. *Kemmerer* is, for a number of reasons,
 18 inapplicable to this situation.

19 The Authority's current spin on § 821.6, while creative, invites the Court to apply blanket
 20 immunity to all disciplinary action against public employees. Under the Airport Authority's reading
 21 of the statute, a public employer may claim absolute immunity for even the most craven retaliatory
 22 behavior, provided such behavior is characterized as an "official" investigation. But, as this response
 23 will explain, there is a world of difference [under § 821.6] between the Airport Authority's
 24 investigation of alleged misconduct and a prosecuting officer's investigation of a matter to be
 25 brought in formal judicial or administrative proceedings.

26 **II.**

27 **STATEMENT OF RELEVANT UNDISPUTED FACTS**

28 Hernandez takes exception with a misleading characterization of the Airport Authority's
 PL'S SUPPL. MEMO OF P'S & A'S IN OPPOS. TO DEF SDCRAA'S MSJ OR SUMM. ADJUD.

1 Code of Ethics. While he does not dispute that the Airport Authority is empowered to promulgate
2 an ethics code, Hernandez rejects the implication that the termination of Hernandez was part of an
3 ethics proceedings against him. It is unclear what the “fact” is the Airport claim with regard to an
4 administrative or judicial proceeding. The situation is similar to the law enforcement officer
5 who—for personal reasons—arrests and incarcerates an innocent citizen, and then decides not to report
6 the matter to the prosecuting agency. As argued below, such acts are not immune, because the act
7 of prosecution normally engages a “process” subject to standards of accountability. It seems the
8 Airport’s fuzzy rendition of the facts reflects a “have your cake and eat it too” philosophy of
9 personnel management, i.e., to take statutory protections without acknowledging concurrent
10 obligations.

III.

ARGUMENT

A. The Airport Authority's Claim of Immunity Perverts Notions of Fundamental Fairness
Normally Associated with an Administrative Proceeding

15 The Airport Authority accomplished the termination of Hernandez' employment without
16 having to conform to any rule or to the standards normally accompanying a fair administrative
17 process. Having treated him arbitrarily, it now seeks protection of a statute which presumes the
18 commencement of proceedings imbued with due process protections. Indeed, if Hernandez had been
19 protected by civil service, Ms. Bowens would probably have refrained from harming him.

The case of *Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, examined internal, non-mandatory grievance procedures—considerably more rigorous than those which protected Hernandez—and ruled they do not rise to the level of an administrative proceeding. In that case defendants sought to dismiss plaintiff's claim based on his failure to exhaust “administrative” remedies available through a grievance procedure. The court noted an administrative remedy implies a “meaningful opportunity to be heard in his defense. Every one of the numerous common law precedents in the area establishes that this element is indispensable to a fair procedure.” [*Id.* at 740] “At a minimum, ... fair procedure requires adequate notice of the administrative action proposed or taken by the group or institution and a reasonable opportunity to

1 be heard." [Id. at 741]

2 In this case Hernandez was informed of his termination upon the completion of the
 3 investigation of counsel retained as his adversary to represent the interests of the Airport Authority.
 4 That was the end of the "administrative" process through which the Airport Authority seeks
 5 immunity. This "proceeding" was no more than a grotesque parody of due process, and certainly
 6 made no effort to comply with the fundamental rules of an administrative process—real or imaginary.¹

7 **B. Government Code § 821.6 Immunizes Only Those Who Prosecute Administrative or
 Judicial Proceedings**

9 Occasionally, it is helpful to examine the words of a given statute before attempting to
 10 interpret it, even at the risk of redundancy or repetition. Section 821.6 reads as follows:

11 "A public employee is not liable for injury caused by his instituting
 12 or prosecuting any judicial or administrative proceeding within the
 13 scope of his employment, even if he acts maliciously and without
 probable cause."

14 It would, therefore, seem that the plain meaning of the statute would exclude those from
 15 immunity who are not engaged in the institution or prosecution of a judicial or administrative
 16 proceeding. This strongly suggests that public officers who discharge a prosecutorial function
 17 receive a protection which officers who do not. The most typical application of this distinction is
 18 in the function of a police officer and a district attorney. A police officer is not immune from
 19 making an arrest without probable cause, while a prosecutor is immune from instituting the
 20 prosecution. Those who make misleading disclosures to prosecuting officials have no immunity.

21 [See *Jackson v. City of San Diego* (1981) 121 Cal.App.3d 579, 583-589; *Harden v. San Francisco*
 22 *Bay Area Rapid Transit Dist.* (1989) 215 Cal.App.3d 7, 16-17] The police may benefit from a §
 23 821.6 immunity if and only if it results in a prosecution, and even then the immunity applies only
 24 to damages commencing with the arraignment proceeding (a judicial event). Damages for

25 _____
 26 Even now there is a motion for a protective order filed to protect the secrecy of deliberative processes
 27 of Mr. Patrick Swan, the attorney hired by the Airport Authority to render opinions forming the basis of Hernandez'
 28 termination. Thella Bowens—the Airport CEO—claims to have relied on his opinions. In his motion for protective order,
 Swan presently claims the Airport Authority was his client, and that he has a right to protect his work product and client
 communications from discovery even after his opinions have been offered as evidence in this case.

1 incarceration and arrest up to that moment are subject to no immunity. *[Asgari v. City of Los*
 2 *Angeles* (1997) 15 Cal.4th 744, 748, 758 n.10]

3 If a police officer—who has an explicit duty to investigate and report crime—is not shielded
 4 by § 821.6 for false arrest and imprisonment, or for falsely reporting facts to a prosecutor, how is it
 5 that the Airport Authority claims immunity? The Airport Authority rests its case on the appellate
 6 decision of *Kemmerer v. City of Fresno* (1988) 200 Cal.App.3d 1426, which it claims is “directly
 7 on point.” [See Authority’s brief at 6:11]

8 The Airport Authority’s reading of *Kemmerer* is flawed. In *Kemmerer* the Court of Appeal
 9 applied immunity to the investigation of employee misconduct which resulted in disciplinary action.
 10 The Court there applied the immunity only because the investigation was tethered to a civil service
 11 proceeding which the employer later commenced. The *Kemmerer* decision relied heavily on the case
 12 of *Kayfetz v. State of California* (1984) 156 Cal.App.3d 491, 496, where the defamatory publication
 13 of an administrative proceeding was deemed immune.

14 In *Kayfetz*, the court applied Government Code section 821.6 to a
 15 situation in which plaintiff, a doctor, had sued the State of California,
 16 the Board of Medical Quality Assurance, the Physicians Diversion
 17 Program and the diversion program administrator for damages arising
 18 from the publication of disciplinary action taken against him. The
 19 court held the publication was an integral part of the prosecution
process and that "Government Code section 821.6 cloaks the action
 in immunity . . ." (*Id.* at 494) and therefore the trial court had properly
 sustained the defendants' demurrer without leave to amend.
 [Kemmerer, *supra*, at 1436][Emphasis added.]

20 The *Kemmerer* decision, as in *Kayfetz*, emphasized that the employer’s investigative conduct
 21 was integrally related to the same employer’s subsequent decision to institute a civil service
 22 administrative proceeding:

23 In the instant case, Kelley initiated formal disciplinary proceedings
 24 against Kemmerer after Velasquez conducted an investigation and
 25 filed an interoffice memorandum detailing the investigation and
 26 recommending dismissal of Kemmerer. The report was dated April
 27, 1984. As the director of the department of social services, the
 28 institution of proceedings by Kelley would be within the scope of his
 employment. The procedures included a formal notice and
 opportunity for hearing with full appeal rights to the Fresno County
 Civil Service Commission. The investigation by Assistant Director
 Velasquez was an essential step to the institution of the disciplinary
 process and is also cloaked with immunity. The investigation, the
preliminary notice and the proceedings before the civil service

1 commission come within the scope of an "administrative proceeding"
 2 as that term is used in Government Code section 821.6. It follows
 3 that pursuant to section 821.6, Kelley, Velasquez and the County are
 immune from tort liability for any acts done to institute and prosecute
 the disciplinary proceeding. [Id. at 1426-1437]² [Emphasis added.]

4 Neither the plain wording of § 821.6 nor the interpretative language of *Kemmerer* support
 5 the application of a prosecutorial immunity to an individual or agency not charged with responsibility
 6 to institute and sustain an administrative proceeding. It is certainly a misstatement for the Airport
 7 Authority to contend that the "Courts have routinely held that an investigation of a public employee,
 8 and any resulting termination qualifies as an "administrative proceeding" under § 821.6."
 9 [Authority's brief at 5:20-22] The Airport Authority, therefore, presently asks the Court to charge
 10 boldly into uncharted territory.³

11 C. Section 82.6 Does Not Immunize Conduct Untethered to an Administrative Proceeding

12 All of the cases cited by the Airport Authority, such as *Kayfetz* and *Kemmerer* mentioned
 13 above, involve the institution of administrative or judicial actions. The Authority cited *Summers v.*
 14 *City of Cathedral City* (1990) 225 Cal.App.3d 1047, but there "At the time of this purported
 15 termination, plaintiff was a regular, nonprobationary employee, and thus was entitled to notice and
 16 the right to respond prior to any termination of his employment, and to an evidentiary hearing
 17 subsequent to such a termination" [Id. at 1053] The Authority cites to *Richards v. Department of*

18
 19 ² Civil Service proceedings described in *Kemmerer* are subject to procedural requirements and
 20 safeguards applicable to all administrative proceedings. Civil service employees having a statute-based property interest
 21 in continued employment may not be deprived of their employment without due process. [*Cleveland Bd. of Educ. v.*
 22 *Loudermill* (1985) 470 U.S. 532, 538-541] Before a state civil service employee can be deprived of employment, the
 23 employee must be given prior notice of any proposed disciplinary action and the reasons for it, a copy of the charges
 24 and materials on which the action is based, and the right to respond either orally or in writing to the official imposing
 25 the discipline. [*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215] These requirements have given rise to an
 26 administrative procedure known as a *Skelly* hearing, in which an employee has the opportunity to respond to the charges
 27 on which the proposed discipline is based. [*Flippin v. Los Angeles City Bd. of Civil Serv. Comm'r's* (2007) 148 Cal. App.
 28 4th 272] The *Skelly* hearing and related rights are preremoval safeguards that are required even if the employer provides
 additional levels of administrative review are present, conduct of *Skelly* hearing by manager who initially recommended
 discharge does not violate employee's due-process rights].

3 ³ Counsel's confidence in this proposition does not appear to be sincere. Mr. Plevin, as here, is lead
 27 counsel of record in the case of *Chapin v. Aguirre* 2007 U.S. Dist. LEXIS 41459. In that case the Court ruled that §
 28 821.6 was inapplicable to Aguirre's termination of deputy city attorneys because it did not involve the institution of an
 administrative proceeding. The opinion in that case was published only six months ago.

1 *Alcoholic Beverages* (2006) 139 Cal.App.4th 304, 318, but there the case involved a licensing
 2 proceeding instituted by an entity charged with a duty to review licenses. The Authority cited
 3 *Ingram v. Filippo* (1994) 74 Cal.App.4th 1280, 1293, but there the case was against a district attorney
 4 for public announcements tethered to his institution of judicial proceedings. The Authority cited
 5 *Asgari v. City of Los Angeles* (1997) 15 Cal. 744, 756-757, but that case was against a police officer
 6 who engaged the district attorney to commence a criminal prosecution—i.e., a judicial proceeding.⁴
 7 The Authority cited *Jacqueline v. Alameda County Child Protective Services* (2007) 155 Cal.App.4th
 8 456, 466-468, but that case involved investigation in support of the institution of child custody
 9 proceedings. The Authority then cited *Javor v. Taggart* (2002) 98 Cal.App.4th 795, 809, but that
 10 case involved public officials “charged with seeking reimbursement from illegally uninsured
 11 employers after the state pays benefits to an injured employee. Their decisions are made in the
 12 course of investigations and also through formal administrative proceedings.” [Id.] Finally, the
 13 Authority cites to *Braun v. Chronicle Publishing* (1997) 52 Cal.App.4th 1036, 1049, for the
 14 proposition that Thella Bowens’ investigation of Hernandez was an administrative proceeding, but,
 15 frankly speaking, the analysis associated with the *Braun* case is unintelligible.⁵

16 The dearth of legal support for the Airport Authority’s claim that its ethics investigation was
 17 an “administrative proceeding” should, at this juncture, be regarded as fatal to the Airport
 18 Authority’s burden of proof in asserting this defense.

19 *Kemmerer* is, at best, weak authority for the aggressive expansion of governmental immunity.
 20 The *Kemmerer* decision actually applied two different governmental immunities: (1) a discretionary
 21 immunity for government policy makers under § 820.5; and (2) a prosecutorial immunity under §
 22 821.6. *Kemmerer*’s analysis of § 820.5 does not represent the prevailing view, and has been openly
 23

24 ⁴ In *Asgari*, the California Supreme court applied immunity only as to damages incurred after formal
 25 arraignment on criminal charges because the police are charged with a duty to investigate crime and submit it for
 26 prosecution and because a prosecution actually occurred. Otherwise, no immunity would have been applicable. In
 27 Hernandez’ case there was no prosecution and the purpose of the investigation was employment discipline—a non-
 28 administrative act.

25 ⁵ The Airport Authority may be using *Braun*’s definition of “official proceeding”—which includes
 26 official audits—to fill in the missing link to its claim, i.e., that Bowens’ investigation was part of an administrative
 27 proceeding, even though no such proceeding took place or was contemplated. Since the *Braun* case embraced a
 28 different set of policies and priorities, the use of the case here is incomprehensible.

1 criticized. [See *Johnson v. State of California* (1968) 69 Cal. 2d 782, 794; *Harmston v. City &*

2 County of San Francisco 2007 U.S. Dist. LEXIS 74891; *Chapin v. Aguirre* 2007 U.S. Dist. LEXIS

3 41459]

4 *Kemmerer's* analysis of immunities applicable to civil service administrative processes, while

5 still the law, has been ruled inapplicable where there is a statutorily imposed employee protection

6 for whistle-blowing. [See *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1424-1425.] In reaching

7 its decision, the Court stated:

8 • In interpreting legislative enactments, "we indulge in a presumption
 9 that constitutional and legislative provisions were not intended to
 10 produce unreasonable results. [Citation.]" (*Barber v. Blue* (1966) 65
 11 Cal.2d 185, 188 [52 Cal.Rptr. 865, 417 P.2d 401].) "Where a statute
 12 is susceptible of two constructions, one leading to mischief or
 13 absurdity, and the other consistent with justice and common sense,
 14 the latter must be adopted. [Citations.]" (*Lampley v. Alvares* (1975)
 15 50 Cal.App.3d 124, 128- 129 [123 Cal.Rptr. 181]; see *Stanley v.*
 16 *Justice Court* (1976) 55 Cal.App.3d 244, 253 [127 Cal.Rptr. 532].)
 17 CA[7c][7c] Recognition of section 821.6 immunity for cases falling
 18 within section 19683 would largely emasculate the latter section and
 19 thereby frustrate the legislative purpose behind its enactment.

20 Similar policies apply here and support the limited application of the immunity statute. Its
 21 expansive interpretation would tend to emasculate the protection offered to whistle-blowers
 22 protected under § 1102.5 by allowing all public employers to shield themselves from liability by
 23 merely claiming to be conducting a so-called "official" investigation. Since the *Shoemaker* case
 24 precludes the application of immunity in the whistle-blower context, even where civil service
 25 administrative procedures engage, it would be difficult to explain a statutory policy justifying the
 26 expansion of § 821.6 where there is no such procedure engaged or contemplated.⁶

27 **D. The Availability of a Non-Mandatory Labor Board Remedy Does Not Otherwise Place**
Hernandez Claims Within the Kemmerer Decision

28 When ordering further briefing, the Court indicated a concern over whether the jurisdiction
 29 of the Labor Board might affect the applicability of the § 821.6 immunity. While the Court's interest

⁶ The expansion of such an immunity into non-administrative acts likewise runs afoul of long-standing constitutional principles (First Amendment) which preclude a public employer from retaliating against a public employee for expressing views involving matters of public interest. [See *Gray v. Tulare* (1995) 32 Cal.App.4th 1079; *Waters v. Churchill* (1994) 511 U.S. 661]

1 in this issue is appropriate, the authorities and analysis mentioned above suggest that the availability
 2 of a Labor Board remedy would not affect the application of § 821.6. Since the invocation of a
 3 Labor Board remedy would the consequence of an administrative proceeding instituted by
 4 Hernandez, no prosecutorial immunity on behalf of the Airport Authority is engaged. Moreover, the
 5 simple fact, that an administrative proceeding might follow with the Labor Board after the Airport
 6 Authority's decision to terminate Hernandez' employment, cannot activate an immunity. If that were
 7 the case, then the simple fact, that the Airport Authority could be sued for wrongful termination,
 8 would place its wrongful act within the ambit of an immunized prosecution. But there is no
 9 authority for the proposition that anticipated litigation—administrative or judicial—can be the basis
 10 of a prosecutorial immunity. Not having pursued this issue, the Airport Authority apparently agrees.

11 **CONCLUSION**

12 What the Airport Authority has attempted to characterize as a routine application and
 13 function of § 821.6, is far from it. It has, in fact, requested judicial "interpretation" of § 821.6, which
 14 would more appropriately be characterized as "legislation." By its newly formulated definition of
 15 "administrative proceeding," the Airport Authority appears to comprehend all government
 16 employment actions within the class of administrative proceedings, despite constitutional principles
 17 and legislative enactments which curtail the expansion of such immunities.

18 DATED: December 3, 2007



19 CATHRYN CHINN, ESQ.
 20 PETER G. FRIESEN, Attorneys for
 Plaintiff JOSE HERNANDEZ

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PL'S SUPPL. MEMO OF P'S & A'S IN OPPOS. TO DEF SDCRAA'S MSJ OR SUMM. ADJUD.

1 **Hernandez v. SD Regional Airport Authority**
Diego County Superior Court Case No. GIC 871979

2 **DECLARATION OF PERSONAL SERVICE**

3 I, the undersigned, declare: That I am, and was at the time of service of the papers
4 herein referred to, over the age of eighteen years, and not a party to the action; and I am
5 employed in the County of San Diego, State of California, in which county the within-
6 mentioned service occurred. My business address is _____, San
7 Diego, California. I served the following document(s):

8 see attached list

9 on the parties in said action by personal service on:

10 FRED M. PLEVIN (SBN 126185)
11 SANDRA L. MCDONOUGH (SBN 193308)
12 ALBERT R. LIMBERG (SBN 211110)
13 PAUL, PLEVIN, SULLIVAN & CONNAUGHTON LLP
14 401 B Street, Tenth Floor
15 San Diego, California 92101-4232
16 Telephone: 619-237-5200
17 Facsimile: 619-615-0700
18 **ATTORNEYS FOR DEFENDANT SAN DIEGO COUNTY REGIONAL AIRPORT
19 AUTHORITY**

20 by delivery to:

21 Name (and title) of person left with: _____

22 Address where served: same as above

23 Date of delivery: December 3, 2007

24 Time of delivery: _____.m.

25 I declare under penalty of perjury under the laws of the State of California that
the foregoing is true and correct. Executed on December 3, 2007, at San Diego, California.

LIST OF DOCUMENTS

PLAINTIFF JOSE HERNANDEZ' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT SAN DIEGO COUNTY REGIONAL AIRPORT AUTHORITY'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

PLAINTIFF JOSE HERNANDEZ' COMPENDIUM OF FOREIGN AUTHORITY IN OPPOSITION TO DEFENDANT SAN DIEGO COUNTY REGIONAL AIRPORT AUTHORITY'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

